No. 21900

In the

United States Court of Appeals

For the Ninth Circuit

OTIS CROOKER,

Appellant,

vs.

WARREN GRAFT,

Appellee.

Brief of Appellee

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STATEMENT OF FACTS

In our view the statement of facts in the appellant's brief presents a completely one-sided and distorted version of the facts of this case. For that reason we deem it essential to present our own statement in this brief.

For approximately sixteen years prior to July 30, 1962, the date of the accident, and continuously thereafter, the defendant, Otis Crooker, has owned, maintained and operated a resort business at Ennis, Montana. During that period he has maintained for the use of his patrons cabins, a bar and cafe, and as an incident to that business, an airport upon his premises. While a greater number of his patrons are transported to this facility by private auto-

mobiles, a substantial number of them come and go by private aircraft, using the facilities maintained by Mr. Crooker for that purpose. Gasoline and oil for airplanes are available for puchase at the airport, at the retail prices customarily charged in that area. Since the airport has no permanent attendant, aircraft owners desiring to purchase fuel must either service their airplanes themselves or call upon Mr. Crooker to do so. (Tr. 6-8, 206.) Mr. Crooker testified that he charged no fees for the privilege of landing at his airport, but he was unable to name any private airport in Montana where such fees are charged, and could cite only one public airport, West Yellowstone, which imposes a landing fee. (Tr. 194, 195.)

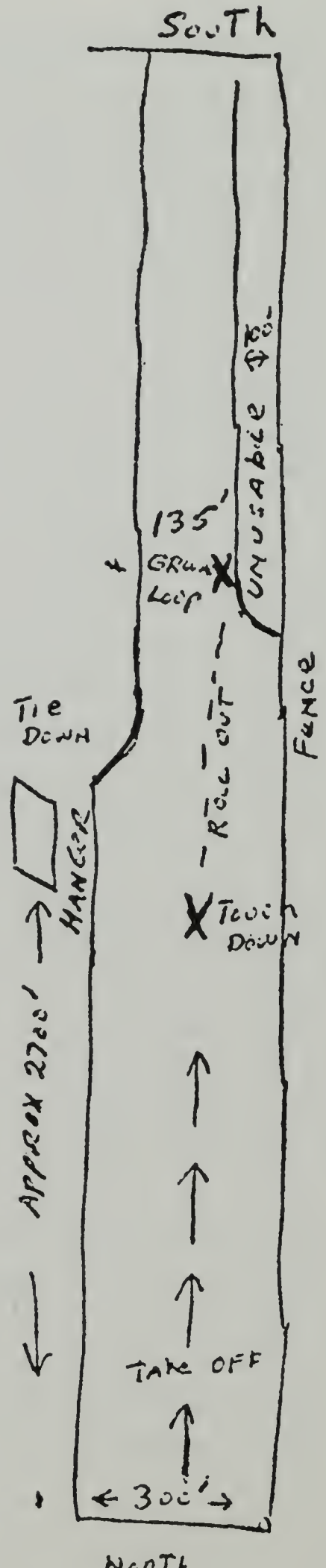
The airport at its nearest point is about 200 feet from the rest of Crooker's resort. It is approximately 300 feet wide by 3600 feet long, with a fence running in a north-south direction along the west boundary. Crooker testified that of this area, he maintained for runway purposes only the easterly 135 feet, and that this was a constant width from the north end to the south end of the airport. He testified that the remainder of the tract, consisting of the entire westerly portion, was "unusable" as a runway, and that there was a clear distinction between the usable and unusable portions throughout the length of the airport. (Tr. 183-185.) His testimony is controverted by the testimony of the plaintiff, Mr. Graft; also by the testimony of Mr. Cantwell, an FAA inspector who examined the premises immediately after the accident and who drew an outline of the runway for inclusion in his report; and also by the photographs taken by Mr. Graft at the time of and a week or so after the accident.

The plat of the Ennis airport, on file at that time as a part of the public records of the Federal Aviation Agency, disclosed a runway 3667 feet in length with a uniform

width of 300 feet. (Plaintiff's Exhibit No. 1.) Mr. Cantwell testified that such plats were prepared from information obtained either from the airport operator or from visual inspection made by FAA personnel. (Tr. 45.) Mr. Crooker, the defendant, recalled that his airport had been inspected or observed by employees of the Federal Aviation Agency and he believed that this map had been prepared by such inspection. (Tr. 12.)

Mr. Cantwell, flight operations inspector for the Federal Aviation Agency, was at the scene of the accident a few hours after it happened. (Tr. 38.) He made a visual inspection of the field for the purpose of determining the cause of the accident, and paced off the boundaries of the runway. This inspection disclosed to him that the usable runway was approximately 300 feet wide at its north end and that the runway maintained this width for approximately two-thirds of its length, going south and that from that point to the south end of the runway, it narrowed to a width of approximately 135 feet. It appeared to Mr. Cantwell that the unusable portion in the southerly one-third of the runway had been made so by excavation and grading which had been conducted there. (Tr. 47.) To illustrate his findings, he drew a sketch showing both the outside boundaries of the runway and the usable portion thereof and made this sketch a part of his accident report. This sketch, which is a part of Plaintiff's Exhibit No. 2, is reproduced on the following page (P. 4) of this brief, for the convenience of the Court.

The portion which Mr. Cantwell designated as unusable was found by him to contain boulders, depressions and soft dirt, as distinguished from the gravel surface of the usable portion. Mr. Cantwell's inspection disclosed that there were no visible markings to indicate the boundaries of the runway. He testified that normally in cases like this the


SOUTH
UNUSABLE RD.
135'
GRUND LOOP
TIE DOWN
HANGER
ROLL OUT
FENCE
TOUCH DOWN
APPROX 2700'
TAKE OFF
300'
NORTH

boundaries of the runway are marked by flags or by some other form of marker. (Tr. 50, 51.) Upon his return to Helena, he checked the records at the FAA office and found no NOTAMS with respect to this field. NOTAMS are published FAA reports issued for pilots' information, which indicate peculiar characteristics or hazards existing at particular airports. He testified that in the case of private airports the FAA depends upon information furnished to it by the airport owner. (Tr. 52.) Shortly before his flight, Mr. Graft checked the published NOTAMS to determine whether special hazards existed at the Ennis airport, and found nothing. (Tr. 140.)

It is undisputed, and admitted by Mr. Crooker, that no signs or notices of any kind were posted in the area, indicating the usable portion of the strip. No mention was made by Mr. Crooker to Mr. Graft of any peculiar conditions at the airport, although Crooker fueled the airplane in Graft's presence on the previous day and at that time noticed that it was an amphibian. (Tr. 209.)

Mr. Graft had carefully computed the airplane load before leaving. The rear seat, which on this trip was unnecessary weight, was removed, thus reducing the overall weight by approximately twenty pounds. (Tr. 22.) He and his passenger took with them luggage and fishing gear estimated by Mr. Graft to have a maximum weight of fifty pounds. (Tr. 24.) Although Mr. Crooker stated that he observed the luggage and estimated it to weigh about 200 pounds, his cross-examination disclosed that, in his recollection, the luggage consisted of two brief case-sized suitcases, about one foot high and eight inches thick, two duffle bags, and two or three fishing rods. Of these items, he picked up only one suitcase and pushed aside the fishing rods. He picked up no other items. (Tr. 190-194.)

On the morning of their departure, Mr. Graft's party arose about daybreak, loaded their airplanes and were prepared to take off within an hour to an hour and a half. Mr. Graft does not recall the temperature that morning, except that it was "a little chilly," jackets were required, and they had to wipe the dew from the windshield. (Tr. 26, 27.) Mr. Porter, a member of their party, had checked the weather and had relayed this information along to Mr. Graft. As he started the airplane, Graft noticed that the windsock on top of the hangar showed a variable southerly wind of between five and ten miles per hour. He was aware of no slope from north to south, and the runway appeared to be fairly level. On the basis of this observation, he determined to take off from north to south and he taxied to the north end of the runway, accompanied by another airplane belonging to Mr. Chapman, of his party. (Tr. 30.) After arriving at the end of the runway, he performed the usual checking and testing procedures and determined that the aircraft was functioning properly. (Tr. 31.) He then taxied into position on the runway, at what he considered to be the center thereof, halfway between the east boundary line and the fence on the west. At that point the entire width of approximately 300 feet appeared to him to be usable, and there were no indications to the contrary for as far south as he could see at that point. In his words, "It all looked like it was the same width all the way through from one end to the other." (Tr. 80.) Mr. Graft then commenced his takeoff, maintaining at all times a close observation of the runway ahead of him. The wheels of the airplane left the ground at a point approximately one-third of the way down the runway, Mr. Graft having elevated the airplane as quickly as possible because of the rough field conditions. (Tr. 33.) The airplane was leveled about four

to five feet off the ground to gain air speed before climbing out. When about half of the runway had been traversed, and while at this altitude, the plaintiff was faced with the decision of whether to attempt to climb out over the obstructions on the south end of the runway, or to abort the takeoff and land on the remaining portion. Since he was in doubt as to whether he could clear the obstructions, he decided to abort. (Tr. 34.) During all of this time, up to that point and thereafter, he maintained a close and steady lookout forward down the runway. The appearance of the terrain remained the same, and nothing in his vision warned him of a rough terrain ahead, or of the narrowing of the runway toward the south end. (Tr. 80, 81.) He made a smooth and uneventful touchdown and was completing his rollout without difficulty until at a point about 500 feet from the south end of the runway he encountered obstructions in the runway causing the aircraft to cartwheel and to be extensively damaged. (Tr. 33-35.)

The appellant's statement of facts intimates that the accident was caused by a change in course of the aircraft to the right after it touched down, and further intimates that this alleged change in direction was caused by some defect occurring upon the touchdown. (Appellant's Brief, pages 5 and 6.) There is nothing in the record which will support these conclusions, and they are directly contrary to the court's findings of fact. As stated by the court in its Finding of Fact No. IV: "While the aircraft apparently turned somewhat to the west after touchdown, there is no evidence of any violent swerving at the time of touchdown nor that the aircraft was out of control until the obstructions were encountered." While it is true, as plaintiff states, that the aircraft came to rest at a point to the west of the "runway," which had narrowed as indicated in Mr. Cantwell's map, it

was still well within the area where Mr. Graft expected to find runway, with ample justification.

Contrary to appellant's statement of facts, Mr. Cantwell did not find "distinguishable markings-scrapings" at any point on the usable portion of the runway, but found such marks at a point in the unusable portion, where he felt that the bow wheel had given way. (Tr. 58.) That marking on the surface was only "slightly to the right" of the point where plaintiff had originally touched down. (Tr. 59.)

Appellant's statement that Mr. Cantwell's drawing was based on information furnished by Mr. Graft is likewise incorrect. The drawing was based on the observations made by Mr. Cantwell at the scene within a few hours after the accident, and his dimensions were the result of his having paced off the field. (Tr. 44, 61, 63.)

Upon these facts, the court concluded that the relationship between the plaintiff and the defendant was that of business invitee and business invitor; that the defendant owed to the plaintiff the duty to use reasonable care to provide a reasonably safe place for the landing and takeoff of plaintiff's aircraft and a duty to warn the plaintiff of any hidden dangers; that the failure to more clearly delineate the usable from the unusable parts of the airport rendered the same unsafe in the absence of any warnings; that no warnings were given and the defendant was guilty of negligence, which was a proximate cause of the accident. (Findings of Fact No. II and III.)

The court further held that the act of the plaintiff in aborting the takeoff was not negligent; that the plaintiff was negligent in attempting to take off under the circumstances and with the existing load, but that his negligence in that respect was not a proximate cause of the accident. (Finding of Fact No. IV.)

ARGUMENT

The Plaintiff Was a Business Invitee to Whom the Defendant Owed the Duty to Warn of Obstructions on the Airport.

The defendant has not formerly assigned as error the finding that the plaintiff was a business invitee. Nevertheless, counsel have argued that Crooker's airport facility was maintained as an accommodation to the public, that his sales of aircraft fuel were unprofitable, and that he charged no fee for the privilege of landing at his airport. (Appellant's Brief, page 2.) It is undisputed, however, that the airport was maintained by Mr. Crooker as an integral part of his resort facility, a profitable operation, that it was advertised in the directory of the Montana Aeronautics Commission and in the records of the Federal Aviation Agency, and that a substantial number of his patrons arrived at the resort by means of the airport. We submit that the plaintiff, a patron of the defendant, was a business invitee, and that the defendant had the duties of an invitor with respect to his premises.

The duties of an airport operator with respect to his premises are expressed in *Corpus Juris Secundum,* Volume 2, *Aerial Navigation,* page 913, as follows:

> "An airport owner has a duty to keep the runway free from obstructions, so far as possible, or to place markers where required, to warn pilots of danger."

And in the supplement to that work, section 36, note 63.15, it is stated:

> "An airport operator has duty to see that airport is safe for aircraft and to give proper warning of any danger."

In *Beck v. Wing's Field, Inc.,* D.C., E.D. Pa., 1940, 35 F.Supp. 953, the plaintiff damaged his aircraft when he

encountered a dip in defendant's runway upon landing. The court denied a motion for new trial after a jury verdict for the plaintiff, and upheld the following instructions which had been given to the jury:

> "The owner of premises, such as the defendant here, who owned, operated and maintained a commercial landing field for airplanes, upon which persons like the plaintiff come by invitation, express or implied, owes a duty to such persons to maintain the premises in a reasonably safe condition for the contemplated use thereof, and the purposes for which the invitation was extended.
>
> "The defendant owed a legal duty to the plaintiff to use reasonable care to keep the premises in a reasonably safe condition so that the plaintiff in landing his aircraft would not be unreasonably exposed to any danger."

In *Mills v. Orcas Power & Light Co.,* 56 Wash.2d 807, 355 P.2d 781, the Washington Supreme Court stated, by way of dicta:

> "A public airfield extends an implied invitation to aircraft, and the duty owed, therefore, is one of reasonable care to see that the premises are safe. (Citing cases.) The law thus places on proprietors of airfields the obligation to see that the airport is safe for such aircraft as are entitled to use it, and to give proper warning of any danger of which they knew or should have known."

Similar statements were made in *Hendren v. Ken-Mar Air Park, Inc.,* 191 Kan. 550, 382 P.2d 288; and *Peavey v. City of Miami,* 146 Fla. 629, 1 So.2d 614.

The District Court Was Justified in Finding That the Defendant Was Negligent and That This Negligence Was the Proximate Cause of the Accident.

This case was tried to the court, sitting without a jury, which concluded upon the evidence and as findings of fact that the failure to more clearly delineate the usable from the unusable parts of the airport rendered the same unsafe in the absence of any warning. The court also found as a fact that no warnings were given and concluded that the defendant was guilty of negligence, which was a proximate cause of the accident. The appellant complains of these findings, largely upon the basis of his own testimony to the effect that only 135 feet in width of the entire airport was usable as a runway, and upon the supporting testimony of Mr. Carkeek, a long-time friend and former business partner of the defendant. (Tr. 217.)

Even if we assume these facts to be true, they cannot absolve the defendant from negligence without a showing that the plaintiff knew or should have known of this condition. Mr. Crooker admits that he placed no markings showing the boundaries of the runway, and that he gave no warning to the plaintiff. The need for such markers or warning is most vividly demonstrated by the testimony of Mr. Cantwell, the independent and unbiased FAA inspector. He made a visual inspection of the field and could not distinguish between the so-called "usable" and "unusable" portions except in the portion indicated in his map at the extreme south end. (Plaintiff's Exhibit No. 2.) Certainly his testimony, with that of the plaintiff, was sufficient to justify the conclusions of the court.

The court found that the plaintiff was guilty of negligence in taking off under the existing weather conditions and with the existing load, but he concluded that this negligence was

not a proximate cause of the accident, and that the defendant's negligence was a proximate cause. While we may disagree with the court's conclusion that the plaintiff was negligent, it is our position that all of these decisions are peculiarly within the province of the trier of the facts, and should not be reversed on appeal.

There is ample support for the court's conclusions on the question of proximate cause. The court found that the plaintiff would have had no difficulty in bringing his airplane to a stop without damage, except for the obstructions in the runway. Accordingly, he found that the plaintiff was in no different position than he would have been if he had landed at the airport and encountered such obstructions.

The situation presented here is among those contemplated by section 468 of the *Restatement of Torts,* 2nd Ed.:

> "The fact that plaintiff has failed to exercise reasonable care for his own safety does not bar his recovery unless his harm results from one of the hazards which make his conduct negligent."

In the comment after this section, at page 518, the following observations are made:

> "c. There is a difference to be noted between negligence and contributory negligence. Where the negligence of a defendant creates a risk of a particular harm, occurring in a particular manner, and the same harm is in fact brought about in another manner, through the operation of some intervening force which was not one of the hazards making up the original risk, the defendant normally is not relieved of responsibility by the intervention of the force, and is liable for the harm. (See § 442 A and Comments.) *But where the negligence of the plaintiff creates a risk of a particular harm to him, occurring in a particular manner, and the same harm is in fact brought about by the intervention*

> *of a force which was not one of the original hazards, the plaintiff is not barred from recovery.* This difference is to be attributed to the more restrictive attitude of the courts toward contributory negligence, as compared with negligence, and their tendency to confine it within somewhat narrower limits." (Emphasis supplied.)

In the very recent case of *Stahl v. Farmers Union Oil Co.,* 145 Mont. 106, 399 P.2d 763, the Montana Supreme Court said:

> "Contributory negligence is not established until causal relationship between it and the injury is shown."

In many other cases the Montana court has emphasized the fact that a showing of contributory negligence is not sufficient to preclude recovery, without a further showing of proximate cause. While these questions were properly held in those cases to be matters for the jury to determine, the facts in several of those cases bear similarity to those presented here, and they demonstrate the concern of the Montana court about the existence of proximate cause in such situations. In *Leichner v. Basile,* 144 Mont. 141, 394 P.2d 742, the plaintiff fell down hallway steps at the Bella Vista Club in Billings. The lower court had instructed the jury as follows:

> "Contributory negligence is negligence on the part of the person injured which cooperating in some degree with the negligence of another helps in proximately causing the injury of which the plaintiff thereafter complains."

The Supreme Court held that the giving of this instruction was error prejudicial to the plaintiff, stating that the use of these words "was not a proper standard as it must contribute immediately and as a proximate cause."

The court then quoted at length from *Wolf v. O'Leary, Inc.,* 132 Mont. 468, 318 P.2d 582. In that case the plaintiff was riding with her husband on a highway near Billings under very adverse weather conditions when the automobile struck an excavation placed in the highway by the defendant. The court reversed a judgment entered upon a verdict for the defendant, basing its decision upon the giving of a similar instruction to the jury. We quote from the opinion at page 473:

> "In Beach, Contributory Negligence (2d ed.) section 26, pages 31, 32, the author points out that for contributory negligence to be available as a defense 'There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligence must *substantially* contribute to produce the injury, in order to avail the defendant anything, and also that it must not only concur in the transaction, but also cooperate in producing the injury. * * * So also there is a line of cases to the effect that, when the plaintiff, though negligent, could not, by the exercise of ordinary care, have escaped the consequence of the defendant's negligence, he may recover.' This statement is supported by the Montana cases cited above."

In *Tiddy v. City of Butte,* 104 Mont. 202, 65 P.2d 605, the plaintiff was injured when he fell in an excavation near a city sidewalk. In affirming a judgment for the plaintiff, the court said:

> "In considering the question of contributory negligence, it is necessary to take into account the proximate cause of the injury in connection with the contributory negligence alleged. This court held in *Fulton v. Chouteau County Farmers' Co.,* 98 Mont. 48, 37 Pac. (2d) 1025, that to bar recovery by plaintiff in a personal injury action on the ground of contributory neg-

ligence, it is not sufficient that he was negligent; it is only when his negligence contributed to the injury at the time it was inflicted and was a proximate, and not a remote, cause of the injury that he cannot recover. We think the negligence of the defendant is shown in both the defective sidewalk and in defendant's not protecting the public against the excavation contiguous thereto, and, as to plaintiff's contributory negligence, one is not required to devote his time and attention to discover defects in the municipal sidewalks on which he travels. He has a right to assume they are in a reasonably safe condition, but he may not close his eyes to obvious danger. (*Nilson v. City of Kalispell,* 47 Mont. 416, 132 Pac. 1133.)"

The foregoing authorities were cited in the opinion of the district court, as was *Prosser, The Law of Torts,* 431 (3d Ed., 1964). In that opinion, the court observed that it made no difference whether the "particular risk" approach of Prosser and the American Law Institute, or the "proximate-remote" approach of the Montana Supreme Court, is used. He found that under either approach the plaintiff's negligence did not bar recovery.

The Court's Decision on the Question of Proximate Cause Finds Support in the Evidence, and Thus Should Not Be Reversed on Appeal.

We submit that the decision with respect to proximate cause, in Montana as elsewhere, is a jury question, or a question for the trier of the facts if there is no jury, in all cases where there is supporting evidence. This is apparent from the Montana cases which were previously cited in this brief. This being the case, we contend that the appellant has no standing to ask for a review of that decision.